STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EVELYN YBARRA-GROSFIELD, Charging Party, v. OXNARD ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4722-E PERB Decision No. 1728 December 21, 2004

Appearances: Evelyn Ybarra-Grosfield, on her own behalf; Burke, Williams & Sorenson, LLP by Yuri A. Calderon, Attorney, for Oxnard Elementary School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Evelyn Ybarra-Grosfield (Ybarra-Grosfield) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the Oxnard Elementary School District (District) violated the Educational Employment Relations Act (EERA)[1] by misapplying its summer pay and substitute pay policies.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended unfair practice charge, the District's response to the charge, the Board agent's warning and dismissal letters, and Ybarra-Grosfield's appeal.[2] In light of this review, the Board finds that the unfair practice charge should be dismissed and deferred to arbitration.

[1]EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2]The Board did not accept the District's late-filed response to the appeal since it did not show good cause under PERB Regulation 32136. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

BACKGROUND

This case is the second in a series of events involving these parties. The Board recently dismissed a charge involving facts preceding the ones at issue. (See Oxnard Elementary School District (2004) PERB Decision No. 1679.)

Ybarra-Grosfield is employed by the District as a permanent teacher and is a member of the certificated bargaining unit. During the 2002-2003 school year, Ybarra-Grosfield and the District disputed the District's calculation of Ybarra-Grosfield's pay.

According to the District, Education Code sections 45038 and 45039 authorize the District to divide the annual salary estimate into 10, 11, or 12 equal payments. The collective bargaining agreement (CBA) between the Oxnard Educators Association (OEA) and the District provides that unit members are to be compensated in 12 equal payments. However, due to reporting requirements to the California State Teachers' Retirement System and the County Office of Education, the District is unable to divide the total by 12 as required by the CBA. Instead, the District must divide the salary into 11 monthly equal payments, withhold approximately 8.33 percent of gross salary from each paycheck, and make one final installment payment in July, which is referred to as "summer pay." The 8.33 percent deduction for 11 months amounts to one month's pay.

This total is only an estimate of actual earned salary. A teacher's earned salary is calculated by multiplying the daily rate by the number of days the teacher actually worked. Absences due to illness or accident are compensated through the paid leave entitlement to avoid a deduction in salary. A teacher may work as little as 8 days in a month or as many as 23 days. The Education Code also provides teachers with additional time off with compensation for accident or illness. If a teacher is absent in excess of the allotted paid leave time and must take unpaid sick leave, the teacher's pay is adjusted by subtracting from the

monthly estimate the number of unpaid sick leave days times the daily pay rate. This adjustment is made in subsequent months. When a teacher's absences exceed earned pay, the teacher will owe the District money.[3]

Under Education Code 44977, once paid leave is exhausted, the teacher is paid differential pay up to five months (or 100 days) and the amount deducted cannot exceed the sum actually paid a substitute, i.e., the teacher is entitled to the daily pay rate minus the actual pay to a substitute teacher hired to replace the absent teacher. The District has adopted a substitute salary schedule designed to attract high quality substitutes. Substitutes initially receive $95 per day but beginning the 15th consecutive day of the same assignment, that rate is increased to $105. Beginning with the 61st day of the same assignment, the amount is changed to the rate paid to permanent teachers. All substitutes for summer school/intersession are paid $25 per hour. Retired teachers or contract teachers who wish to work extra hours as a substitute are paid $120 per day irrespective of the duration of their service. This schedule has been in effect since 1999 but changes may be negotiated.

Beginning in September 2002, this payment system was applied to Ybarra-Grosfield. In the 2002-2003 school year, Ybarra-Grosfield worked a total of 26.5 days out of the 181 work days in the CBA. Her 10 paid sick days were exhausted at the beginning of September 2002. Ybarra-Grosfield used her sick leave and accident leave to cover some of these absences. On July 22, 2003, Ybarra-Grosfield met with the District requesting that the District refund her monies she felt were due her. She believed that the District owed her $3099.66, which the District had deducted as "summer pay." She alleges that this was due to overpayment of the substitute by $3622.91. On July 24, 2003, Ybarra-Grosfield e-mailed the Ventura County Superintendent of Schools, Charles Weis (Weis), related the situation to him

[3]The CBA provision on sick leave and computation of pay sets forth this procedure.

and asked for payment pursuant to Education Code 45035.[4] Weis assured her that payment would be made. On August 13, 2003, Ybarra-Grosfield wrote to the District business services office to request payment. On August 15, 2003, the District's general counsel wrote to Ybarra-Grosfield asking her to stop harassing District employees about issues related to her pending grievances. The letter explained why she would not be receiving summer pay that year. The letter also stated that mediation of her grievance was scheduled for September 8, 2003, where she will have the opportunity to discuss her pay issues. The general counsel suggested that Ybarra-Grosfield contact the District's Human Resources Officer if she had questions. On September 3, 2003, Ybarra-Grosfield e-mailed Dr. Mark Jackson, the Assistant Superintendent for Human Resources and Support Services to decline authorization of such deductions from her paycheck for the following school year and to seek reimbursement for monies already deducted.

Back on April 28, 2003, Ybarra-Grosfield filed a grievance regarding summer pay and payment of substitutes. The grievance was denied at Steps 1 through 3 on the basis that she overdrew her sick leave in May and June 2003 and deducted the difference from her paycheck. Ybarra-Grosfield then requested Step 4 mediation. The charge alleges that the mediation occurred on January 30, 2004 without Ybarra-Grosfield's presence or her consent. The mediator e-mailed Ybarra-Grosfield explaining that the mediation service only deals with

[4] Education Code section 45035 provides:

> If any school district fails to pay the salary of any person employed by it in a position requiring certification qualifications who has on file a contract of employment held valid by the legal adviser of the county superintendent of schools having jurisdiction over the district, such county superintendent of schools may transfer sufficient money from the funds of the district to the county school service fund and pay such salary from such fund.

disputes between employee organizations and employers, and that OEA did not rebut the District's position. She believed that an arbitrator would rule in favor of the District.

Ybarra-Grosfield also alleges that the substitute teacher who worked during her absences was overpaid. Although the substitute could be paid up to $120 per day, she was actually paid more than $200 per day.

The amended charge appears to allege the District's failure to reasonably accommodate her allergies. She does not identify a CBA provision covering this issue. When she inquired about the discrepancy in her pay, the District wrote her to stay away from the payroll department because these communications constituted "harassment." She states that there is no CBA provision or school board policy that establishes how substitutes are paid. Finally, Ybarra-Grosfield argues that the statute of limitations should be three years similar to civil proceedings, instead of six months.

BOARD AGENT'S DISMISSAL

The Board agent determined the charge to be untimely filed. The charge was filed on February 2, 2004. Therefore, only events occurring on or after August 2, 2003 would be considered timely. In April 2003, Ybarra-Grosfield filed a grievance regarding the pay issues. In July 2003, she met with District officials regarding this issue. Since Ybarra-Grosfield knew of the District's conduct before August 2003, i.e., more than six months before filing the charge, the Board agent found the charge untimely and dismissed the charge.

The Board agent further explained that under certain circumstances, the limitations period may be tolled. For example, EERA section 3541.5(a)(2) allows tolling of the limitations period during the time it takes to exhaust the grievance machinery. However, the issue presented in the unfair practice charge must be the same as the issue presented in the

grievance procedure. The charge fails to show that the grievance covers the same allegations as the charge.

Even assuming the charge were timely filed, the Board agent found the charge failed to state a prima facie case. Although the charge did not allege discrimination, the Board agent analyzed it under that theory. The charge does not demonstrate protected conduct that occurred before the adverse action or that the District's actions are unlawfully motivated by Ybarra-Grosfield's protected conduct. The amended charge failed to correct any of the deficiencies stated in the warning letter and only argued that a 3-year statute was appropriate since it would match the limitations period in civil proceedings.

YBARRA-GROSFIELD'S APPEAL

On appeal, Ybarra-Grosfield states that she is representing other unnamed employees with the same complaint. The conduct is continuous and so the statute of limitations has not run. She asserts that the Board should enforce the CBA and that sometimes grievances take longer than six months, as in this particular case. She asserts that PERB should have a longer limitations period to correspond with CBA grievance processes.

She also raises issues about OEA failing to fairly represent her. OEA and the District mediated without her consent or presence. The District withheld her summer pay based upon inaccurate calculations in order to pay a substitute $210 per day, an unlawful amount.

Ybarra-Grosfield also raises new issues about signing away her rights to work in an allergen-free classroom on April 12, 2004, the day before the appeal was filed. Attached to the appeal is the alleged written waiver. She raises issues about the District's failure to pay certain insurance premiums that she authorized with pay stubs attached in support of this allegation. Her concluding plea however is for the Board to reconsider her allegations regarding summer

pay and overpayment of substitutes from her salary on behalf of herself and all other District teachers similarly affected.

DISCUSSION

EERA section 3541.5(a)(l) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (Cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In this case, in April 2003, Ybarra-Grosfield filed a grievance regarding summer pay and overpayment of substitutes. Thus, Ybarra-Grosfield was aware of these issues in excess of six months before filing the unfair practice charge and so normally, her charge would be deemed to be untimely.

However, in certain circumstances, the statute of limitations may be tolled. For example, the limitation period is tolled during the time it takes the charging party to exhaust the contractual grievance machinery through settlement or binding arbitration. (Sacramento City Unified School District (2001) PERB Decision No. 1461 (Sacramento).) EERA section 3541.5(a)(2) provides, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.. . .The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

The statute of limitations begins to run once the party knew or should have known of the conduct underlying the charge. (Sacramento.) The statute is tolled once the grievance is filed, but only regarding the conduct contained in the grievance. (Id) The limitations period begins to run again once the grievance process has been exhausted. (Id.)

Citing State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S (Food and Agriculture), in its response to the charge, the District asks that the charge be deferred to arbitration. We agree. Section 3541.5(a) (2) of the EERA states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry Creek),[5] the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations. EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.[3] [Fn. omitted; fn. 3 to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.]

[5]See also Food and Agriculture.

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, the District's response dated February 20, 2004, indicated its willingness to proceed to arbitration. The District did not raise any procedural defects.[6] Finally, contrary to the finding in the dismissal, we conclude that the issues raised in the grievance are the same as the allegations in the unfair practice charge. Both the grievance and the charge allege that the District wrongly did not pay Ybarra-Grosfield her summer pay and overpaid her substitute teacher at her expense. The District itself asserts this fact in its February 20, 2004 response to Ybarra-Grosfield's charge. The District further states in its response that the grievance was submitted to Level 5 arbitration, that the parties had recently selected an arbitrator, but that the date for arbitration had not yet been scheduled. Ybarra-Grosfield never disputes these facts.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Following the arbitration of this matter, Ybarra-Grosfield may seek a repugnancy review by

[6]If there are procedural defects involved in the grievance and if the District refuses to waive its procedural defenses, then Ybarra-Grosfield may resubmit her charge for further processing.

PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek, supra.)[7]

Ybarra-Grosfield also raised new issues in her appeal about OEA's failure to fairly represent her, about signing a form dated April 12, 2004 and about the District's failure to pay certain insurance premiums on her behalf. However, the Board will not entertain new charge allegations or new evidence absent a showing of good cause. (PERB Reg. 32635.) Here, Ybarra-Grosfield has not provided support for a showing of good cause.

The Board notes that the District filed two separate late responses° both dated May 20, 2004 to two different PERB offices without including any evidence that the responses were served on Ybarra-Grosfield. As a result, these responses were not considered in rendering our decision.

Therefore, the Board orders that the charge be dismissed and deferred to arbitration.

ORDER

The unfair practice charge in Case No. LA-CE-4722-E is hereby DISMISSED and DEFERRED TO ARBITRATION.

Chairman Duncan and Member Neima joined in this Decision.

[7]Pursuant to EERA section 3541.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

°The case was docketed on May 10, 2004.